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No. _____

In The

Supreme Court of the United States

JUDY WEAVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Judy Weaver was convicted for aiding and abetting the failure to make refunds of student loans and Pell Grant funds in violation of 20 U.S.C. § 1097(a). That section imposes criminal liability upon "[a]ny person who knowingly and willfully embezzles, *misapplies*, steals, obtains by fraud, false statement or forgery or *fails to refund*" financial aid funds provided or insured by the federal government (emphasis added). The indictment and factual basis both failed to allege Mrs. Weaver converted the subject funds. Despite this Court's previous observation that the failure to refund constitutes misapplication under § 1097(a), the lower court held misapplication and failure to refund are separate and independent crimes. The court also held although conversion is an element of misapplication, it is not an element of the failure to refund student loan funds. The questions presented are:

1. Whether "fails to refund" is conduct constituting the offense of misapplication under § 1097(a), or is instead a separate and independent offense.

2. Whether a prosecution pursuant to § 1097(a) for failure to refund student loan funds requires allegation and proof of conversion.

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PETITION FOR A WRIT OF CERTIORARI

Judy Weaver ("Weaver") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 18, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is reported at 275 F.3d 1320 (App. 1-27). The February 26, 2002 order of the Eleventh Circuit denying the petition for rehearing and suggestion for rehearing en banc is unreported (App. 28-29). The orders of the district court are unreported.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its corrected opinion and judgment on December 18, 2001. The Eleventh Circuit entered its order denying Weaver's timely filed petition for rehearing and rehearing en banc on February 26, 2002. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THIS CASE

United States Code Title 20; § 1097(a), as amended in 1992, provides:

(a) **In general**

Any person who knowingly and willfully embezzles, misapplies, steals, obtains by fraud, false statement, or forgery, or fails to refund any funds, assets, or property provided or insured under this subchapter and part C of subchapter I of chapter 34 of Title 42 or attempts to so embezzle, misapply, steal, obtain by fraud, false statement or forgery, or fails to refund any funds, assets, or property, shall be fined not more than $20,000 or imprisoned for not more than 5 years, or both, except if the amount so embezzled, misapplied, stolen, obtained by fraud, false statement, or forgery, or failed to be refunded does not exceed $200, then the fine shall not be more than $5,000 and imprisonment shall not exceed one year, or both.

STATEMENT OF THE CASE

A. The Higher Education Act of 1965 and Amendments

This case concerns the meaning of § 490(a) (Pub. L. 99-498), 100 Stat. 1491 of the Higher Education Act of 1965 as amended by the Higher Education Amendments of 1992, Pub. L. 102-325, § 495, 106 Stat. 631 and codified at 20 U.S.C. § 1097(a) (1992 ed.). That section declares it a felony "knowingly and willfully" to, among others, misapply or fail to refund student loan funds insured under Title IV of the Higher Education Act of 1965.

Immediately prior to its amendment in 1992, 20 U.S.C. § 1097(a) provided in relevant part: "Any person who knowingly and willfully embezzles, *misapplies*, steals,

or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under this subchapter . . . shall be fined not more than $10,000 or imprisoned for not more than 5 years, or both" (emphasis added).

In 1992, § 1097(a) was amended. The amended, and current, version provides in relevant part: "Any person who knowingly and willfully embezzles, *misapplies*, steals, obtains by fraud, false statement, or forgery, or *fails to refund* any funds, assets, or property provided or insured under this subchapter . . . shall be fined not more than $20,000 or imprisoned not more than 5 years, or both" (emphasis added).

The legislative history accompanying the 1992 amendment to § 1097(a) provides:

> Both the House and Senate bills make the attempt to obtain Title IV funds illegally subject to criminal penalty, but the Senate bill is more specific and includes false statements, forgery, or fraud. The Senate bill also includes the failure to make refunds among the specifically named *activities* subject to criminal penalties. The House recedes. The conferees wish to *emphasize* that *failure to pay refunds does constitute criminal misapplication* under current law. *Language is added in this bill merely as a clarification.*

H.R. Conf. Rep. No. 102-630, at 513 (1992) (emphasis added).

B. Factual Background

The Information alleged Flagler Career Institute, Inc. ("Flagler") was a wholly owned subsidiary of Wangberg

Enterprises, Inc, which was solely owned by Louis Wangberg, who was not charged in the Information. Flagler offered associate degrees in various medically-related programs. It closed in February, 1998. Flagler participated in federal student loan and grant programs which were insured or guaranteed by the Department of Education and was required to refund federal loan and grant money for students who withdrew from the school.

The Information charged Mrs. Weaver was the director of finance for Wangberg Enterprises, Inc., and/or Flagler. The Information further asserted Louis Wangberg, not Mrs. Weaver, signed a Program Participation Agreement with the Department of Education, agreeing to comply with all statutes and regulations governing student loan programs, including repayment of unearned tuition.

The Factual Basis of the Plea Agreement describes the school's participation in federal grant and loan programs, the school's responsibility to make refunds when a student withdrew, and Mrs. Weaver's assistance in developing corporate strategies, policies, and budgets. The Factual Basis also asserts Mrs. Weaver's responsibility for review of the school's calculation of refund amounts, preparation of accounts payable and her repeated discussions with Mr. Wangberg, "a number of times per month, . . . [about] the refund issues and Flagler's need to make refund payments."

The Factual Basis further recites Mr. Wangberg "did not consider making refunds a priority," an admission that Mr. Wangberg, not Mrs. Weaver, gave authorization for presentment for payment. The Factual Basis also asserts Mrs. Weaver had responsibility for physically writing

checks, but only until February 1997, when Mr. Wangberg took control of the funds and Mrs. Weaver thereafter could not write any checks without his approval. The checks were held by the school director until he was satisfied funds were available to release them.

As set forth in the Plea Agreement, Mrs. Weaver calculated refund amounts, physically wrote refund checks and was aware the school was having financial difficulties and there were refund arrearages. With minor exceptions, however, Mrs. Weaver did not have the final authority to submit refund checks for payment and the Factual Basis of the Plea Agreement does not allege that she had such authority, but rather asserts that authority was vested in Mr. Wangberg. Indeed, Mrs. Weaver had no authority to even write checks without prior approval for the entire last year of the school's operation, commencing in February 1997, during which time the refund balance grew substantially. Moreover, Mrs. Weaver is not alleged to be, nor was she responsible for, the financial difficulties and loss of accreditation that befell the school and ultimately led to the school's nonpayment of refunds.

Nowhere in the Information, Plea Agreement, Personalization of Elements, or the Factual Basis is it alleged Mrs. Weaver engaged in the intentional *conversion* of loan funds to her own use or the use of a third party.

C. Procedural History

A one count Information was filed on July 14, 1999, charging Mrs. Weaver with knowingly and willfully aiding and abetting a violation of 20 U.S.C. § 1097(a), in connection with Flagler's failure and/or inability to refund federal financial aid received by the school from or on

behalf of its students who subsequently withdrew from the school. A Plea Agreement was filed and Mrs Weaver's guilty plea subsequently was accepted by the district court, which had jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

On May 31, 2000, Mrs. Weaver filed her Motion to Withdraw Guilty Plea and Request for Evidentiary Hearing. By order dated September 22, 2000, the motion was denied. Mrs. Weaver timely appealed from that order and it was docketed by the Court of Appeals for the Eleventh Circuit as appeal No. 00-15145-HH.[1] Mrs. Weaver subsequently was sentenced to the custody of the United States Bureau of Prisons to be imprisoned for a term of four (4) months. Mrs. Weaver then filed a Motion for Correction of Sentence, which was denied. Mrs. Weaver timely appealed from that order, which the Eleventh Circuit docketed as No. 00-15751-HH. The Eleventh Circuit consolidated the appeals.

On November 13, 2001, the panel filed its opinion affirming both the denial of Mrs. Weaver's Motion to Withdraw Guilty Plea and her Motion for Correction of Sentence. On December 18, 2001 the court vacated its November 13, 2001 opinion and substituted a corrected opinion. Mrs. Weaver timely filed Petitions for Rehearing and Rehearing En Banc of both opinions, which were

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[1] As noted by the Eleventh Circuit, Mrs. Weaver's argument that conversion is an element of failure to refund student loan funds under § 1097(a) was not addressed in the district court's order denying her motion to withdraw her plea. *United States v. Weaver*, 275 F.3d 1320, 1327 (11th Cir. 2002). That order therefore is not included in the Appendix to this Petition.

denied on January 7, 2002 and February 26, 2002, respectively.

The defendant is not in custody, having been granted bond pending appeal.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's interpretation of § 1097(a) conflicts both with the Seventh Circuit's and this Court's interpretation of that section. There additionally is intracircuit conflict in the Eleventh Circuit concerning the application of § 1097(a), which has, and will continue, to produce anomalous and unjust results. Moreover, the Eleventh Circuit's decision has erroneously created a new federal crime. This case urgently requires this Court's review to prevent further improper prosecutions under § 1097(a).

I. The Court of Appeals' Interpretation of 20 U.S.C. § 1097(a) Conflicts with the Seventh Circuit's Interpretation

In Mrs. Weaver's appeal to the Eleventh Circuit, the court initially noted conversion is an element of misapplication under § 1097(a). *United States v. Weaver,* 275 F.3d 1320, 1330 (11th Cir. 2002) (citing *United States v. Kammer,* 1 F.3d 1161, 1165 (11th Cir. 1993) and *Bates v. United States,* 522 U.S. 23, 31 n.7, 118 S.Ct. 285,139 L.Ed.2d 215 (1997)). The court then acknowledged "the more difficult issue is whether 'fails to refund' is an independent ground upon which criminal liability attaches under § 1097(a),

and, if so, whether conversion is an element of that offense as well." *Id.*[2]

In its analysis of § 1097(a), the court found "no indication on the face of § 1097(a) that Congress intended 'misapplies' and 'fails to refund' to be the same thing or interchangeable." *Id.* at 1331. Had Congress, however, amended § 1097(a) to impose criminal liability upon "'[a]ny person who knowingly and willfully . . . misapplies by failing to refund'" student loan funds, the Eleventh Circuit would have agreed with Mrs. Weaver that the reference to failure to refund "was added only to clarify that a misapplication may encompass the failure to refund and that is not an independent" offense. *Id.* Because § 1097(a) contains no such language, the court concluded "fails to refund" is an offense separate from misapplication criminalized under § 1097(a). *Id.*

The Eleventh Circuit next examined the legislative history of the 1992 amendment to § 1097(a). The court found ambiguous the House Conference Report which provides "The conferees wish to emphasize that the failure to pay refunds does constitute criminal misapplication under current law. Language is added in this bill merely as a clarification." H.R. Con. Rep. No. 102-630, at 513 (1992) *reprinted in* 1992 U.S.C.C.A.N. 334, 628. The court noted Mrs. Weaver's interpretation of this history is that "misapplication may encompass a failure to refund but did

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[2] In framing the issue as whether "fails to refund" is an "independent *ground*" for liability under § 1097(a) and, if so, "whether conversion is an element of *that offense* as well, the Eleventh Circuit failed to distinguish criminal *conduct* from distinct criminal *offenses*. As shown *infra*, "fails to refund" is an example of *conduct* constituting the *offense* of misapplication under § 1097(a).

not eliminate the conversion requirement for a misapplication, even when the conduct is the failure to refund." *Id.* at 1332. The court's preferred interpretation of this history, however, was that

> Congress recognized that it had created a separate crime with its 'or fails to refund' language and added this legislative history to foreclose the obvious post-amendment argument that failure to refund only became a crime under § 1097(a) after the 1992 amendment. More specifically, under this interpretation, the legislative history only makes clear that an individual who failed to refund could always have been charged with criminal misapplication under the pre-amendment § 1097(a), and that the addition of 'fails to refund' as a separate crime does not change this.

Id.

The Seventh Circuit's interpretation of the 1992 amendments to § 1097(a) differs in principle from the Eleventh Circuit. In *United States v. Ross*, 77 F.3rd 1525 (7th Cir. 1996), Ross was convicted of violating § 1097(a). As Ross's trial took place in 1991, he was subject to the pre-amendment version of § 1097(a) which contained no reference to failure to refund. The trial court nonetheless instructed the jury it could convict Ross for "failure to make refunds." Ross argued the instruction was erroneous because § 1097(a) did not criminalize failure to refund until after his trial in July of 1992.

Noting the legislative history of the 1992 amendment to § 1097(a), the Seventh Circuit stated "failing to make refunds constituted misapplication within the meaning of § 1097(a) even prior to its amendment . . . Thus, the

district court's directions that *failure to properly refund federally insured moneys can constitute misapplication* were proper." *Id.* at 1541 (emphasis added). Thus, a conflict in principle exists between the Eleventh Circuit which interprets the failure to refund under § 1097(a) to be a *separate crime* from misapplication, not requiring proof of conversion, while the Seventh Circuit views a failure to refund as *conduct* within the ambit of the offense of misapplication, and not as an independent crime.[3] This Court should grant the petition to resolve this conflict.

II. The Court of Appeals' Interpretation of 20 U.S.C. § 1097(a) Conflicts with this Court's Interpretation of That Section

This Court previously interpreted 20 U.S.C. § 1097(a) in *Bates v. United States*, 522 U.S. 23, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997). Bates was an educational institution financial officer alleged to have failed to make student loan refunds. *Bates*, 522 U.S. at 27, 118 S.Ct. at 288. He subsequently was indicted "on 12 counts of 'knowingly and willfully misapply[ing]' federally insured student loan funds between January 15, 1990, and June 15, 1990 in violation of 20 U.S.C. § 1097(a) (1988 ed.) . . . . " *Bates*, 522 U.S. at 28, 118 S.Ct. at 289 (citation omitted). Bates moved to dismiss the indictment on the ground a conviction under § 1097(a) for willful misapplication required

[3] As noted by this Court, the Seventh Circuit also recognizes conversion is an element of criminal misapplication under § 1097(a). *Bates v. United States*, 522 U.S. at 31, 118 S.Ct. at 291 ("Under the Seventh Circuit's construction, § 1097(a) catches only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or the benefit of a third party.")

allegation and proof of the defendant's intent to injure or defraud the United States. *Id.* As the indictment contained no such allegations, it was dismissed by the district court.

The Seventh Circuit concluded intent to defraud the United States was not an element of criminal misapplication under § 1097(a). This Court affirmed the Seventh Circuit, concluding "there is here neither text *nor history* warranting the construction of § 1097(a) that Bates urges us to adopt." *Bates*, 522 U.S. at 31, 118 S.Ct. at 290 (emphasis added).[4]

Bates additionally challenged his prosecution based on the 1992 amendment adding "fails to refund" to the text of § 1097(a). *Bates*, 522 U.S. at 32, 118 S.Ct. at 291. Bates contended the amendment "establishes that the deliberate failure to return GSL funds, without an intent to defraud, was not previously an offense within § 1097(a)'s compass, but became one only under the statute's current text." *Id.* Rejecting this argument, this Court stated

> Congress' 1992 amendment hardly means that § 1097(a) did not previously cover the conduct in question. *Cf. Commissioner v. Estate of Sternberger*, 348 U.S. 187, 194, 75 S.Ct. 229, 233, 99 L.Ed. 246 (1955) ('Subsequent amendments have clarified and not changed th[e earlier] principle.) The three added words – 'fails to refund' – simply foreclose any argument that § 1097(a) does not

[4] Unlike in *Bates*, history here demonstrates Congress intended "fails to refund" to be an activity subsumed within the offense of criminal misapplication pursuant to § 1097(a), and not a separate crime. *See National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974) ("[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent.")

> reach the failure to make refunds; those words do not make the argument a persuasive one. See H.R. Conf. Rep. No. 102-630, p. 513 (1992) ("Failure to pay refunds does constitute criminal misapplication under current law. Language is added in this bill merely as a clarification.")

Id.

Thus, this Court's interpretation of § 1097(a) in *Bates* is that "fails to refund" is not a separate offense from criminal misapplication, but rather an activity subsumed within the latter. As such, the Eleventh Circuit's holding that the failure to refund is a crime separate from misapplication requiring no allegation or proof of conversion conflicts with this Court's interpretation of § 1097(a).[5] This Court should grant the petition to resolve this conflict.

III. The Court of Appeals' Decision Conflicts With Another Eleventh Circuit Decision

The Eleventh Circuit decision in this matter conflicts in principle with its earlier decision in *United States v. Kammer*, 1 F.3d 1161 (11th Cir. 1993). Kammer was a school owner convicted of the crime of misapplication under the pre-amendment § 1097(a) for failing to refund loan payments within the time prescribed by the Code of Federal Regulations. *Id.* at 1162-63. The withdrawn

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[5] "Although *Bates* did not address whether conversion is an element of criminal misapplication under § 1097(a), such a conclusion is implicit in its holding that a specific intent to defraud is not a required element of criminal misapplication." *United States v. Weaver*, 275 F.3d 1320, 1330 (11th Cir. 2002); *see United States v. Kammer*, 1 F.3d 116, 165 (11th Cir. 1993) (holding conversion is an element of criminal misapplication under § 1097(a)).

students' files contained copies of non-negotiated refund checks. *Id.* Kammer was "aging debts," including refunds, so "the most necessary and immediate debts" could be paid first. *Id.* at 1163. The debts Kammer paid in lieu of making refunds included her "salary, campus renovations, consulting fees, loan repayment to her husband, and her private housekeeper." *Id.* at n.5.

The federal regulations applicable both here and in *Kammer* permitted schools to "commingle" their own money with federal financial aid funds in operating accounts. The court concluded that the fact the school "may have paid operating expenses before a student withdrew, and thus did not have money to refund [the Department of Education] is not a conversion." *Id.* at 1166. That Kammer paid other operating expenses before making the refunds also did not establish a conversion, because the federal regulations contemplated commingling of funds with grant funds being used for operating expenses. *Id.* On these facts, the court reversed Kammer's conviction, noting "we do not hold that a *failure to refund* federal monies will never constitute a crime . . . We reverse in this case strictly on the facts of this case" (emphasis added). *Id.*

Like *Kammer*, Mrs. Weaver was aware school personnel held non-negotiated refund checks resulting from paying the most necessary and immediate school debts first, including teacher salaries. Further, as in *Kammer*, federal regulations permitted the commingling of operating and student loan funds here. In marked contrast to the facts in *Kammer*, however, Mrs. Weaver was not the school owner, but rather the director of finance. She was not a corporate officer, director or shareholder. Unlike *Kammer*, Mrs. Weaver did not use student loan funds to pay campus

renovation bills, consulting fees or loan repayments to her husband or her private housekeeper.

Kammer's *conduct* was the failure to refund student loan funds. She was charged, however, with the *crime* of misapplication of federal financial aid funds. Similarly, Mrs. Weaver's alleged conduct was the failure to refund student loan funds. She was prosecuted, however, under the failure to refund prong of § 1097(a), as amended. For more reprehensible conduct, Kammer's *conviction* was *reversed,* while Mrs. Weaver was not permitted to *withdraw her guilty plea* and proceed to trial. *Weaver* therefore conflicts with *Kammer* in that (1) the *Kammer* defendant's failure to refund student loan funds was considered a form of criminal misapplication and not as a separate and independent crime as in *Weaver*; and (2) *Kammer* required allegation and proof of conversion in a prosecution for the underlying act of failing to refund student loan funds, while *Weaver* did not. The Court should grant this Petition to prevent further intracircuit confusion and inequity.

IV. The Decision of the Court of Appeals is Erroneous

The Eleventh Circuit's holding that "fails to refund" constitutes a crime separate from criminal misapplication and that a prosecution for failure to refund student loans funds under § 1097(a) does not require allegation and proof of conversion is erroneous.

As "emphasize[d]" by Congress, "fails to refund" was added to § 1097(a) "merely" to clarify the conduct of failure to pay refunds forms a part of the crime of misapplication under that section. It was not Congress' intent to create a separate crime. In addition to the House Conference

Report accompanying the 1992 amendment to § 1097(a), Congress' intent not to create an offense separate and independent from criminal misapplication by the addition of "fails to refund" to § 1097(a) is further demonstrated by a February 28, 1992 correspondence from the sponsor of the amendment, Senator Nancy Landon Kassenbaum, to James B. Thomas, Jr., Inspector General of the United States Department of Education. In that correspondence, the legislation's sponsor stated:

> Dear Mr. Thomas:
>
> I am writing to make clear my intention in proposing a modification in the language of Section 490 of Title IV of the Higher Education Act. This modification is found in section 479 of S. 1150, the Senate version of legislation reauthorizing the Higher Education Act.
>
> My proposal, which was adopted by the Committee on Labor and Human Resources and included in S. 1150 as approved by the full Senate, adds to Section 490 a specific reference to the failure to make refunds of federal loan and grant funds provided or insured under Title IV. *My purpose in proposing this language was to clarify what is already intended by this section and to foreclose any argument that the section does not reach the failure to make refunds.*
>
> Section 490 of the Higher Education Act as currently written is extremely broad and reaches a variety of improper conduct involving Title IV funds. *The knowing and willful failure to make refunds has properly been prosecuted as a misapplication of Title IV funds under this section.* The language I proposed for inclusion in S. 1150 was never intended to imply in any manner that the

> current law did not reach such conduct. On the contrary, *my intention was to facilitate prosecution of such conduct by specifically referencing it.* I made this proposal because it came to my attention during the reauthorization process that the failure of some school owners to make refunds or make timely refunds is, unfortunately, a widespread abuse that causes serious harm to the integrity of the federal student financial assistance programs and harm to the students the programs are meant to benefit.
>
> ***It would be an unfortunate perversion of my intention if this clarifying language*** in S. 1150 ***concerning refunds were to be read as an indication that it is not a misapplication*** within the meaning of the current section 490 ***for a school owner knowingly and willfully to fail to make required refunds*** in connection with federally insured student loans and federal student grants.
>
> Warmest Regards,
>
> NANCY LANDON KASSENBAUM
> United States Senator

Joint Appendix to Brief of Appellant in *Bates v. United States*, 1997 WL 245541*40a (emphasis added).

Thus, it was not Congress' intent to create a new crime by the addition of "fails to refund" to § 1097(a). Rather, that language merely was added to ensure the conduct of failing to pay refunds was prosecutable as the offense of criminal misapplication. As noted by this Court and the Eleventh and Seventh Circuits, conversion is an element of criminal misapplication. *See Bates*, 522 U.S. at 31, 118 S.Ct. at 291; *Kammer*, 1 F.3d at 165. Accordingly, a

prosecution under § 1097(a) for failure to refund student loan funds requires allegation and proof of conversion.

As noted previously by this Court, § 1097(a) was designed to "catch[ ] only the transgressor who intentionally exercises unauthorized dominion over federally insured student loan funds for his own benefit or for the benefit of a third party. Innocent . . . maladministration of a business enterprise or a use of funds that is simply unwise [ ] does not fit within that construction." *Id.* at 291. The Eleventh Circuit's new crime of failure to refund which does not contain conversion as an element now "set[s] a trap for the unwary," *id.*, and criminalizes previously innocent conduct.

In addition to the legislative history of § 1097(a) and this Court's decision in *Bates*, the Eleventh Circuit's erroneous conclusion that failure to refund is a separate crime under § 1097(a) is further underscored by the observation that every reported decision concerning § 1097(a) treats the conduct of failing to refund student loan funds as criminal misapplication requiring allegation and proof of conversion. Also of note is the absence of a single reported case charging a defendant with both criminal misapplication and failure to refund. The absence of such cases further confirms failure to refund is not a crime separate and independent from criminal misapplication, but rather, as Congress and this Court have indicated, is an activity forming a part of criminal misapplication, of which conversion is an element.

V. The Questions Presented Are Important

The questions of whether failure to refund student loan funds is a crime separate and independent from

criminal misapplication under § 1097(a) and whether, if a separate crime, the failure to refund requires allegations and proof of conversion are important as they implicate a basic tenant of criminal law that the populace must have clear knowledge as to all the elements of criminal offenses, especially felonies. There currently are more than 5,300 educational institutions nationwide where students receive federal financial assistance. Thus, in addition to Mrs. Weaver, many other persons may be improperly subjected to prosecution for the failure to refund student loan funds pursuant to the Eleventh Circuit's decision.

The Eleventh Circuit's decision presents issues of extreme and urgent importance as every educational institutional, and its employees, paying legitimate operational expenses ahead of student loan refunds out of economic necessity is now guilty of criminal conduct. This was not the intent of Congress in amending § 1097(a). This Court should grant the petition to ensure consistent application of the law to those citizens under investigation for possible violations of § 1097(a) and to prevent the improper and unjust branding of innocent persons as felons.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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